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NO.
October Term 2008

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN BARRETT, M.D.
Petitioner

Versus

TEDD KOREN, D.C. and
KOREN PUBLICATIONS, INC.
Respondent

On Petition For Writ of Certiorari from the Order of the Pennsylvania Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

WHETHER THE PRE-INTERNET CASE OF *New York Times v. Sullivan* ALLOWS A PUBLISHER OF A DEFAMATORY STATEMENT TO CONTINUE TO PUBLISH THE DEFAMATION ON ITS WEBSITE AFTER ACTUAL KNOWLEDGE OF THE FALSITY OF THE PUBLICATION WITHOUT ANY LIABILITY FOR DEFAMATION?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Stephen Barrett, MD respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered on January 2, 2008 to decide an important question of federal law which has not been, but should be settled by the Supreme Court.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania entered January 2, 2008 is reprinted at Page **1a** of the Appendix. The Order and Opinion of the Superior Court of Pennsylvania entered June 11, 2007, is reprinted at Page **2a** of the Appendix.

The Order and Opinion of the Court of Common Pleas of Lehigh County, Pennsylvania entered April 7, 2006, is reprinted at Page **31a** of the Appendix.

JURISDICTION

The final Order of the Supreme Court of Pennsylvania was entered January 2, 2008. This Petition For Writ of Certiorari is timely filed within ninety (90) days pursuant to Supreme Court Rule 13.1. The jurisdiction of this Honorable Court rests upon U.S.C. 1254(1) and Supreme Court Rule 10(c).

FEDERAL PROVISIONS INVOLVED

First Amendment to the United States Constitution U.S.C.A. Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONCISE STATEMENT OF THE CASE

A. Procedural History

On or about March 10, 2003, Plaintiff filed a Complaint against Defendants for defamation in the Court of Common Pleas of Lehigh County, Pennsylvania. On October 10, 2008, a jury trial commenced. At the close of Defendant's case, both parties moved for a directed verdict. On October 13, 2005, the trial court granted Defendants' motion and denied Plaintiff's motion. The Superior Court of Pennsylvania and the Supreme Court of Pennsylvania upheld the trial court's order granting a directed verdict in favor of Defendants.

When the trial judge decided to take Plaintiff's defamation case away from the jury, the judge stated that the United States Supreme Court, in *New York Times Company v. Sullivan,* 376 U.S. 254 (1964) held

that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitution purposes.

On appeal to the Superior Court of Pennsylvania, Plaintiff specifically argued that after Plaintiff informed Defendants that he was not "delicensed", Defendants were acting with actual malice when they kept false information on their website. The appellate court held that it agreed with the trial judge and found that Plaintiff failed to show actual malice based on Defendants' refusal to issue a retraction.

On Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, Plaintiff again specifically presented the issue concerning Defendants' failure to remove the defamatory statement from the internet. After receiving a request for retraction from the Plaintiff, Plaintiff argued that even after Defendants

were informed by Plaintiff that he had not been de-licensed, Defendants refused to remove it, correct it or otherwise retract it from their website. Hence, the federal question of the application of dicta from the 1964 case of *New York Times v. Sullivan,* to an internet case was timely and properly raised and preserved.

B. Material Facts

The Plaintiff is a retired psychiatrist who has devoted 35 years of his professional career to consumer protection issues to help people make intelligent decisions concerning health care. Plaintiff has been critical of some of the claims of the chiropractic profession and has been outspoken concerning his medical opinion of those claims. Due to the national recognition of Plaintiff's accomplishments, Plaintiff conceded at trial that he was a public figure, and must therefore prove that Defendants acted with

actual malice when they defamed him.

Defendants are a licensed chiropractor and his publishing company. Together, they maintain and operate a website providing information on chiropractic care. All current and past newsletters are archived on their website and are readily accessed through Defendants' website or through an internet search engine.

At the trial in this matter, Plaintiff introduced evidence that at age 60, he opted to inactivate his Pennsylvania medical license. He voluntarily retired, without any negative marks on his license or professional career. In Defendants' August 2001 newsletter, they referred to Plaintiff as the "de-licensed" physician, called him a "quackpot", and indicated that he was involved in a potentially meritorious ten million dollar racketeering lawsuit.

Plaintiff argued that all of these statements, when viewed in context, were defamatory, most especially the designation of him as "de-licensed".

In support of his position that the term "de-licensed" was calculated to devalue Plaintiff's professional status, as both a physician and consumer advocate, Plaintiff's counsel argued the term implied Plaintiff's medical license has been involuntarily revoked. Plaintiff presented the jury with the deposition of Defendant/Chiropractor Koren who testified that he had passed the chiropractic licensing tests in both Pennsylvania and West Virginia. The following exchange then took place:

> "Q. Are you still licensed in both states?
> A. I let my West Virginia license lapse.
> Q. When you say you let your license lapse in West Virginia, what do you mean?
> A. I didn't continue paying the fees. I didn't take the postgraduate education that they required.
> Q. Well, were you de-licensed by West Virginia?

A. No. No. Probably still there; I just stopped paying the fees."

Defendant Koren's defensive posture when asked if he was "delicensed" belies his true motive in so describing Dr. Barrett. The Defendant's clear design in writing an article, which even without the term "de-licensed" was highly critical and defamatory, was to undermine Plaintiff's professional reputation and credibility and to undermine his years of work as a consumer advocate. By creating the false impression that the medical profession disassociated itself with Plaintiff, defendants were hoping that the public would disregard Plaintiff's opinions concerning chiropractic medicine.

Even after Defendants were informed by Plaintiff that he had not been de-licensed, they refused to remove it, correct it, or otherwise retract it from their website. By virtue of its continued availability on the internet, the false and defamatory statement that

likely engender in the minds of the average reader, the statements are capable of defamatory meaning. *Tucker, supra.*. A statement is capable of defamatory meaning where it clearly imputes to the person to whom it refers, characteristics and conduct which are incompatible with the proper and lawful exercise of the person's profession. *Cosgrove Studio and Camera Shop, Inc. v. Pane,* 408 Pa. 314, 182 A.2d 751, 753 (1962). A statement is capable of defamatory meaning where the statement "could reasonably conclude that [the subject of the statement] lacked honor and integrity and was not a person to be relied upon insofar as his business dealings were concerned. *Birl, supra,* 167 A.2d at 476.

Considering the full text of the article, Defendants' statements were defamatory.

In the present case, the entire article about

the community or to deter third parties from associating or dealing with him." *Birl v. Philadelphia Elec. Co.*, 402 PA 297, 167 A.2d 475 (1960) (quoting RESTATEMENT (FIRST) OF TORTS §559 (1989), *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001; 'The court must view the statements in context.' *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399, 402 (1987).

Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. Thus, we must consider the full context of the article to determine the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.

Thomas Merton, 442 A.2d at 216; *'Orabl v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 904 (1971). While it is not enough that the victim of the statements be embarrassed or annoyed, a court should not dismiss a case unless it is 'clear' that the publication is incapable of defamatory meaning. *Tucker v. Fischbein*, *supra*; *Vittreck v. Washington Board Co.*, 256 Pa Super 427, 389 Pa. Super 427 (1978"

Reading the statements at issue in this case, in context and looking at the impression that they would

integrity as a member of his profession, the statement is actionable as defamation. *Post v. Mendel,* 507 A.2d 35, 352 Pa (1986) (disparaging a lawyer-plaintiff's integrity as a legal professional is actionable defamation. See also, *Tucker v. Philadelphia Daily News,* 577 Pa. 598, 615, 848 A.2d 113, 124 (2004). (newspaper article was defamatory because it incorrectly implied that community activists were overly interested in money and sex, which would lessen their reputation in the community and likelihood that members of the community would want to associate with them); *MacElree v. Philadelphia Newspapers, Inc.,* 544 Pa. 117, 674 A.2d 1050, 1054 (1996) (publication that implied plaintiff in defamation suit was abusing his elected office and was racist was defamatory because it accused plaintiff of professional misconduct). It is not clear that calling a doctor delicensed is incapable of

defamatory meaning. *Tucker v. Fischbein, supra.* Hence, a jury should determine if the statement was defamatory.

2. A jury should determine if Defendants' continuing publication of the defamatory statements on their website after knowledge of their falsity constitutes reckless disregard or actual malice.

A. The First Amendment demands that Plaintiff, a public figure, prove that the alleged defamatory statement was false and that it was made with actual malice. *Hustler Magazine v. Falwell,* 485 U.S. 46, 52, 99 L.Ed.2d 41, 108 S.Ct. 876 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 162-165, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

Under *New York Times v. Sullivan,* and its progeny, actual malice means knowledge that the

statement was false or made with reckless disregard of whether it was false or not. *New York Times,* 376 U.S. at 279-80. Plaintiff must meet the clear and convincing evidentiary standard concerning whether the evidence presented is such that a reasonable jury might find that actual malice has been shown with convincing clarity. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

B. The mere refusal to retract, by itself, is not sufficient evidence to prove actual malice. *New York Times Co. v. Sullivan* involved an Alabama law which denies a public official recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless plaintiff first made a written demand for a public retraction and defendant fails or refuses to comply. Ala. Code Title 7 §914. Defendant failed to retract the allegedly defamatory statement concerning public figure Plaintiff. The lower

courts ruled malice could be inferred from Defendants' irresponsibility in publishing the statement and from Defendants' failure to retract. Under Alabama law, good motives and belief in truth did not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis,* 271 Ala 474, 124 SO.2D 441 (1960).

This Honorable Court held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide defendant the safeguards for freedom of speech and of the press that are guaranteed by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. This Court held that defendant's constitutional guarantees required a rule that prohibited a public official from recovering damages for a defamatory falsehood relating to the public official's

official conduct unless the official proved that the statement was made with actual malice. This Court defined actual malice as knowledge that the defamatory statement was false or made with reckless disregard of whether it was false or not.

C. Republication of a defamatory statement after notice of its falsity may be treated as evidence of actual malice. Under the evolving body of law since *New York Times v. Sullivan,* publication of a statement after defendant has been notified that plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard.

In 1977, the American Law Institute adopted 580A Restatement 2d of Torts which states that:

> "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct fitness or ole in that capacity is subject to liability if, but only if, he (a) knows that the statement is false and that it defames the other person; or (b) acts in reckless disregard of these matters."

Comment (d) states, *inter alia* that:

> "Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard. There has been no judicial treatment of the effect of the defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory. Under certain circumstances, evidence to this effect might be relevant in showing recklessness at the time the statement was published. It is also possible that the Supreme Court would hold that a state can constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or reckless disregard standard even though the conduct occurred subsequent to the publication."

Weaver v. Lancaster Newspapers, Inc., 592 Pa. 458, A.2d 899 (2007); *Barnett v. Nat'l Enquirer, Inc.*, 144 Cal. App.3d 991, 193 Cal. Rptr 206 (1983); appeal dismissed 465 U.S. 1014 (1984); *Golden Bear Distrib. Sys. v. Chase Revel Inc.*, 708 F.2d 944 (5th Cir. 1983) where the record demonstrates that defendant had

sufficient time to investigate the truth of the defamatory statement, a jury could find that defendant acted with reckless disregard of the truth constituting actual malice). The issue of whether defendants acted with malice or reckless disregard of the falsity of the defamatory statements remains a material issue to be resolved by the trier of fact. *Stucchio v. Tincher,* 726 S.2d 372 (1999) Fla. App. LEXIS 1120.

D. Plaintiff established actual malice because Defendants kept the information on the website after Plaintiff requested a retraction. Once Plaintiff informed Defendants that he had not been delicensed, Defendants acted with actual malice in failing to remove the defamatory assertion from their website.

Plaintiff informed Defendants that Plaintiff had not been delicensed. Defendants failed to remove this information from their website or otherwise indicate therein that the information was incorrect. The

continued appearance of the information on the website was not the equivalent of failing to print a retraction. A newspaper is printed once and then archived. On the other hand, when information is placed on a website and not removed, it remains readily available and reviewed, and hence, continues to be published. Defendants published the information with actual knowledge that it was false.

The Internet can be a dangerous tool, and when someone is informed that information detrimental to a person's professional standing is factually wrong, the person who chooses to maintain that information on their website should not be permitted to do so with impunity. When this comment is viewed in a light most favorable to Plaintiff, a jury could reasonably have concluded that the Defendant was liable. Hence, this defamation action should not have been removed from

consideration by the jury.

E. A jury should determine whether Defendants' continuing publication of the defamatory statement on the Internet after notice of the statement's falsity constitutes reckless disregard or actual malice. Clearly, *New York Times* stated that failure to retract upon Plaintiff's demand is not adequate evidence of actual malice for constitutional purposes. 376 U.S. at 286. The mere refusal to retract by itself, is not sufficient evidence to prove actual malice. Under certain circumstances, evidence of a refusal by a publisher to retract a statement after it has been demonstrated to him to be false and defamatory might be relevant in showing recklessness at the time the statement was published. *Golden Bear, supra.*

It is likewise that refusal to retract may be evidence that there was no actual malice: the refusal may show that the publisher believed and still believes

that the falsehood was true. That a particular piece of evidence may point both ways does not mean that it is not evidence. The reasonableness of the refusal might be some indication of which inference was more likely. When a given fact is susceptible to two reasonable inferences, it is for the jury to determine which one it will adopt. *Time, Inc. v. Hill,* 385 U.S. 374, 394 N. 11, 17 L.Ed.2d, 87 S.Ct. 534 (1967). Dr. Barrett was denied the opportunity for the jury to decide.

Whether the failure of Defendants to investigate constitutes sufficient proof of "reckless disregard" in publication of the truth depends upon the state of the record. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967). Ill will does present circumstantial evidence of actual malice which may be considered by the jury. *Indianapolis Newspapers, Inc. v. Fields,* 354 Ind. 219, 250, 259 N.E.2d 651, 664 (1970; *Nevada Indep. Broadcasting*

Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983). However, this is not a case of mere ill will or bad motive toward Plaintiff, Defendants' actions demonstrate an actionable intent to harm through falsehood. See, *Henry v. Collins,* 380 U.S. 356, 357, 13 L.Ed.2d 892, 85 S.Ct. 992 (1965). Koren's failure to retract here was not a simple matter of ill will or bad motive toward Plaintiff. A reasonable jury could hold Defendants liable for their attitude toward the veracity of their statements after positively learning that Dr. Barrett was not delicensed. Hence, Plaintiff respectfully petitions for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Petition For Writ of Certiorari ought to be granted.

Richard J. Orloski
Attorney for Petitioner

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(1)

Supreme Court, U.S.
FILED
071233 MAR 25 2008
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No.
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IN THE
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Petitioner

Versus

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Respondent

On Petition For Writ of Certiorari from the Order of the Pennsylvania Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

STEPHEN BARRETT, M.D.	:NO. 502 MAL 2007
Petitioner	:
v.	:Petition For Allowance
TEDD KOREN and	:of Appeal from the
KOREN PUBLICATIONS	:Order of the Superior
INC.	:Court
Respondents	:

ORDER

PER CURIAM

AND NOW, this 2nd day of January, 2008, the Petition for Allowance of Appeal is hereby **DENIED.**

TRUE & CORRECT COPY
ATTEST: January 2, 2008 _____
Norina K. Blynn, Chief Clerk

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHEN BARRETT, M.D.	:NO. 502 MAIL 2007
Appellant	:
v.	:IN THE SUPERIOR COURT
TEDD KOREN and	:OF PENNSYLVANIA
KOREN PUBLICATIONS	:
INC.	:NO. 1035 EDA 2006
Appellees	:

Appeal from the Judgment entered April 7, 2006, in the Court of Common Pleas, Lehigh County, Civil No. 2002-C-1837

BEFORE: FORD ELLIOTT, P.J. BOWES, J., and McEWEN P.J.E.

MEMORANDUM: **FILED JUNE 11, 2007**

Appellant, Stephen Barrett, M.D. has taken this appeal from the judgment entered in favor of Appellees, Tedd Koren, D.C. [1] and Koren Publications, Inc. following the grant of appellees' motion for directed verdict and denial of appellant's post-trial motions in this

[1] Doctor of Chiropractic Medicine

health at Penn State University. He donated royalties from his first book to start a television show called *Talk With Your Doctor* to further educate people in the Lehigh Valley. One of his mail fraud investigations ultimately resulted in passage of a federal law strengthening the U.S. Postal Service's ability to crack down on mail-order health frauds. He has assisted the FBI, State Attorney Generals, the Federal Trade Commission and local law enforcement agencies on similar matters, as both a paid and unpaid consultant. Dr. Barrett has been a peer reviewer for seven medical journals, including the *Journal of the American medical Association.* His websites are the target of more than 100,000 hits each month. He has appeared on the Today Show and CNN to educate on healthcare. He earned numerous awards for his work.

After thirty-five years, at age sixty (60), Dr. Barrett opted to inactivate his Pennsylvania medical license in December, 1993. He was voluntarily retiring, without any negative marks upon his license or career. Dr. Barrett never had his license taken away from him. He simply chose to retire to an inactive status.

Appellee Koren is [a chiropractor and] the president of Appellee Koren Publications, Inc. He publishes an electronic subscription newsletter. He also publishes a free electronic

newsletter [of]which he is the sole author. Inside this free newsletter, Appellee has published several things pertaining to Dr. Barrett...
Brief of Appellant, pp. 4-5

Appellee's August, 2001 newsletter stated, in relevant part:

Contents
Palmer
Fear and loathing in Rio de Janiero
Quackbusters Buste[d]
The Therapeutic State
Tedd Koren Patient Newsletter
February Unseminar
Vitamin K shots
Weird hospital stuff
Fascinating Letters from you

I just got back from Palmer Lyceum...
****
Speaking of Sportelli, there's good news about [plaintiff] Stephen Barrett, M.D., the **de-licensed** quackbuster. Not good news for him, but it's pretty good for us.

Quackbusters Busted
Barrett and other 'Quack Busters' who have made a career of attacking chiropractic and other non-pharmaceutical health care arts have a

very thin skin when they are attacked. Their modus operandi is to attack, threaten and start legal actions against those who don't share their bigotry...

...One person Christ[e]ned Stephen Barrett a **'QuackPot'**. It seems that this label drives him especially crazy. (Let's use it all the time when referring to him.)...

But there's more...(is this starting to sound like a TV infomercial?).

Stephen Barrett, M.D., William Jarvis and the entire Quackbuster gang including many of Barrett's business enterprises, associates and organizations are being sued **for $10 million for racketeering, malicious prosecution, abuse of process and other charges** by New Century Press...

But there's more... 14 months ago I was told about the above lawsuit. **Barrett is now in trouble.** I can't tell you more but I will keep you abreast with the late breaking reports as the case develops.

Tedd Koren's August 2001 newsletter, Exhibit P-4 (emphasis supplied.

Appellant filed a complaint in defamation on March 10, 2003. More than two years later, on October 10, 2005, a jury trial commenced and, at the close of

appellees' case, both parties moved for a directed verdict. The trial court, on October 13, 2005, granted appellees' motion, and denied appellant's motion, and appellant thereafter filed post-trial motions seeking a new trial, which were denied. This appeal followed;

Preliminarily, we note our standard of review:

> When assessing the trial court's denial of a motion for new trial, we apply a deferential standard of review. The decision whether to grant or deny a new trial is one that lies within the discretion of the trial court. The appellate court will not overturn such a decision unless the trial court grossly abused its discretion or committed an error of law that controlled the outcome of the case.

McCandless v. Edwards 908 A.2d 900, 903 (Pa.Super. 2006) (citation omitted). In reviewing a trial court's decision to direct a verdict in favor of a defendant,

> we must view the evidence in the light most favorable to the plaintiff in order to determine

> whether plaintiff failed to prove his case as a matter of law. If a jury reasonably could have concluded, on the basis of the evidence and all reasonable inferences therefrom, that the defendant was liable, then the directed verdict must be reversed. Our review over questions of law is, as always, plenary.

Id. (citation omitted).

In this case, appellant, as the plaintiff below, had the burden to prove the elements of defamation[2], and further, as a public figure[3] had to further demonstrate that the statements were made with actual malice:

---

[2] In Pennsylvania, the uniform Single Publication Act prescribes basic elements of the plaintiff's burden of proof in an action for defamation. **See** 42 Pa. C.S. §§8341-8345. Section 8343 provides:

(a) Burden of plaintiff.--In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.
42 Pa. C.S. §8434(a).

[3] There is no dispute that appellant is a public figure.

When the plaintiff is a public figure,..., he must prove that the statements he characterizes as defamatory were made with **actual malice, that is, the speaker either knew that they were false, or recklessly disregarded their falsity. [*Tucker v. Philadelphia Daily News,*** 577 Pa. 598, 624, 848 A.2d 113, 130 (2004)] The burden of proof imposed is substantial, as '[t]he actual malice standard goes so far as to forbid imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements about a public figure or public official." ***Norton v. Glenn,*** 580 Pa. 212, 860 A.2d 48, d56 (2004), **cert. denied**, 544 U.S. 956, 125 S.Ct. 1700 161 L.Ed.2d 539 (2005). Indeed, '[f]ailure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation. Recklessness generally and in the context of actual malice is not easily shown." ***Tucker, supra*** at 135. Moreover, establishment of a defamation claim requires clear and convincing evidence, the highest level of proof for civil claims. ***Bartlett v. Bradford Publishing, Inc.*** 885 A.2d 562, 566 (Pa. Super. 2005) (citation omitted). A showing of actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." ***Curran v. Philadelphia Newspapers, Inc.*** s546 A.2d 639, 642 (Pa.Super. 1988), **appeal**

denied 522 Pa. 576, 559 A.2d 37 (1989) (*quoting* ***St. Amant v. Thompson,*** 390 U.S. 727, 731, [88 S.Ct. 1323, 20 L.Ed.2d 262] (1968).

Blackwell v. Eskin 2007 Pa. Super 20 at ¶6 (Pa. Super. 2007) (emphasis supplied).

The trial court granted appellees' motion for directed verdict based on the conclusion that appellant, a public figure, could not establish actual malice. Specifically, the trial court determined that appellant could not meet his burden since (1) the statements "quackpot" and "in trouble were merely opinion, (2) the statement 'racketeering lawsuit for 10 million" wasn't proven to be false, and (3) the statement that appellant was "de-licensed" was taken by Appellee from another author's website, without serious doubts as to its truth or falsity. The trial court concluded that on this record there was not sufficient evidence presented to permit

the conclusion by a jury, by clear and convincing evidence, that defendant, in fact, entertained serious doubts as to the truth of any of his publications. **See**: N.T. October 13, 2005. p. 19.

Appellant, in challenging the decision of the trial court that granted appellees' motion for a directed verdict, claims that he established actual malice as follows: (1) "appellee's ill will toward appellant provide[d} a motive for appellee's reckless disregard for the truth of his statements" (2) "Appellee made his statements with knowledge that they were false or with reckless disregard of their truth or falsity, (3) Koren's use of the word 'delicensed' was intended to mean that Barrett's license was involuntarily taken away,"[4] and (4) "the trial court improperly condoned appellee's attempt

[4] At trial, appellant testified that he had retired and place his license on "inactive' status. N.T. October 11, 2005. p. 71.

to sanitize the publication of the 'de-licensed' statement by claiming he simply took the statement from another author's writings.[5]

Specifically, appellant contends that Appellees "had a high degree of awareness that their publication contained falsehoods.[6] Appellant argues that "[a]lthough "delicensed" is not really a word, the clear implication of placing "de" in front of "licensed" when referring to a doctor is that the doctor's license was taken away.[7] In support of his position, appellant, at trial, introduced Tedd Koren's deposition testimony. In his deposition Appellee Koren testified that he had been a licensed chiropractor in West Virginia and Pennsylvania, and that had let his West Virginia license lapse by not paying the fees and not attending the

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[5] Brief of Appellant, pp. 12-17
[6] **Id.** p. 13
[7] **Id.** p. 14.

required post-graduate education. Appellant's counsel then asked Koren "Well, were you de-licensed by West Virginia? In response, Appellee answered "no-I just stopped paying the fees.[8] Appellant claims that this testimony demonstrates that Appellee intended to convey that appellant's "delicens[ing]" was involuntary and not related to lapsing.

We have carefully reviewed these arguments, but are not persuaded of their merit. It is well settled that 'evidence of ill will or a defendant's desire to harm the plaintiff's reputation, although probative of the defendant's state of mind, without more, does not establish 'actual malice". ***Blackwell v. Eskin, supra*** 2007 Pa. Super at ¶10, *quoting* ***Lewis v. Philadelphia Newspapers, Inc.*** 833 A.2d 553 (2004). Further,

[8] N.T. October 10, 2005, pp. 154-156.

even accepting appellant's position that Appellee understood the word "de-licensed to mean an involuntary loss of license, the trial court properly determined that "delicensed" which the parties stipulated is a made-up word,[9] was adopted by appellant from the website of another author, that he had his own understanding of the word, and that he had no reason to believe this information was false. Although appellant argues that Appellee, a licensed health care professional, should have checked with the licensing boards before republishing the statement "delicensed" this argument fails since, as this Court pointed out in ***Blackwell., supra*** "[e]ven were Appellee to be deemed negligent for failure to investigate, either by obtaining independent

[9] **See** N.T. October 11, 2005, pp. 103-104.

confirmation of his information or consulting other possibly more reliable sources, that finding would be insufficient to demonstrate actual malice." ***Blackwell v. Eskin, supra,*** 2007 PA Super 20 at ¶9 (citation omitted).

Appellant also argues that the trial court erred "in isolating appellees' alleged defamatory comments instead of construing them as a whole.[10] Specifically, appellant argues that the implied meaning of Koren's statement that "14 months ago I was told about the above lawsuit.[;] Barrett is now in trouble[/]" is that Koren "knew the details of the sit, was privy to its planning and believed that the suit was justified." [11] Appellant claims that the cross examination testimony

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[10] Brief of Appellant, p. 17.
[11] ***Id.*** p. 18.

of Koren, demonstrates that he did not know of the lawsuit 14 months before it was filed.[12] According to appellant, Appellee "falsely suggested that he was familiar with the facts" of the lawsuit.[13]

In determining whether there is clear and convincing evidence of actual malice, the statements must be read in context. ***Reiter v. Manna,*** 647 A.2d 562, 566 (Pa. Super. 1994), *citing* ***Baker v. Lafayette College,*** 516 Pa. 291, 532 A.2d 399 (1987). Here, the record reflects that the trial judge did properly consider the statements in context in making his ruling. The learned Judge J. Brian Johnson, in his on-the-record ruling on appellees' motion for directed verdict, stated:

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[12] ***Id*** pp. 18-19.
[13] ***Id*** p. 19.

With regard to "quackpot," this is something that is not capable of being true or false. It is name-calling. And under the caselaw, name-calling, no matter how offensive[14] is not actionable. So we move to the next one.

"De-licensed." The defendant heard this--or read this, I should say, from another author, Tim Bolen, and copied Bolen's writing to his website and e-mail and repeated the term.

There is no evidence that he entertained serious doubts as to the truth or falsity of this term. He had his own understanding, he accepted the term from Bolen, he had heard it before, he accepted his understanding without question. So there is no evidence that he entertained serious doubts as to the truth of the term.

With regard to the "racketeering suit for 10 million dollars", there was no proof provided by the plaintiff that a racketeering suit for 10 million dollars was not filed. There's no requirement by the defendant that he investigate. There is o evidence that he entertained serious doubts as to the truth of this statement before he published it.

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[14] The appellant is certainly an aggrieved party. Moreover, the ill will of Appellee is apparent as is his desire to harm the reputation of appellant. Nevertheless, as we have hereinabove noted, this Court has clearly established that such conduct, however repugnant, without more, does not equate to "actual malice."

> Finally, the phrase, "in trouble" ***in reference to the 10 million-dollar lawsuit,*** is an opinion. Only statements of fact, not expressions of opinion, can support a defamation action. There is a distinction here with opinions, depending upon whether they are based on facts, if the facts are expressed.
>
> Let me go back to that.
>
> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not sufficient for an action of defamation, no matter how [un]justified and unreasonable the opinion may be or how derogatory it is.
>
> The opinion "in trouble" ***flows from the statement about the racketeering suit.*** That is a disclosed fact, and we have determined it to be a non-defamatory fact. So this is important because of the context of the opinion. And we need to deal with that, which we have now done.
> N.T. October 13, 2005, pp. 17-18 (emphasis supplied)

We discern no basis upon which to disagree with this quite precise, clear and cogent analysis, and find, contrary to the argument of appellant, that the trial

court properly considered the statements in context in determining whether appellant had established a defamation action against Appellees. We simply add that Koren's non-defamatory embellishment, namely, that he was told "14 months ago, about the lawsuit, along with his opinion that appellant was "in trouble", cannot subject Appellees to liability.

Nor do we find merit in the argument of appellant that he established actual malice because Appellees kept the information on the website after appellant requested a retraction. Specifically, appellant argues that after he informed Appellee that he was not "de-licensed" Appellee was "acting with actual malice when he kept false information on his website."[15] As the trial judge correctly noted, the United States

[15] Brief of Appellant. p. 21

Supreme Court, in ***New York Times Company v. Sullivan,*** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), held that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitutional purposes. The trial court further explained:

> [W]hen you talk about what he [Appellee] believed, just because Dr. Barrett asked for the retraction, that didn't necessarily mean that Dr. Koren agreed with him.
> And again we go back to the measure that it is not what a reasonable person would do, it is what Koren actually believed and he still believed those things were true.
> N.T. October 13, 2005, pp. 23-24.

As we agree with the trial judge, we find that appellant failed to show actual malice based on appellees' refusal to issue a retraction.

Lastly, appellant complains that the "the granting

of a directed verdict in favor of Appellees violates the sanction order of the court.[16] Appellant claims that the trial court erred by not enforcing its own discovery sanction order, and by refusing to permit appellant to read into evidence statements that had been ruled admitted as a result of appellees' failure to comply with discovery rules.

During discovery, in July, 2003, appellant filed a Third Request for Admissions which sought admissions from Appellee, including the following:

1. I know of no evidence that the racketeering suit filed in 2001 against appellant was justified.

2. I know of no evidence that appellant is or was delicensed.

3. I know of no evidence that appellant was ever disciplined by the Pennsylvania Board of Medicine.

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[16] *Id.*

Appellee did not respond or object to this discovery request, and ten months later, on April 24, 2004, the trial court entered the following order:

> IT IS ORDERED that the matters regarding which the questions were asked shall be taken to be established for the purposes of the action in accordance with the claims of plaintiff...
> IT IS FURTHER ORDERED that defendants are prohibited from opposing the claims of appellant at trial...

Subsequently, at trial the trial court sustained appellees' belated objections to appellant's Third Request For Admissions, finding that the admissions improperly asked for conclusions of law based on the use of the word "evidence" and therefore they were not admissions by definition. The trial court precluded appellant from reading the Third Request For Admissions into evidence and, at the close of appellees' case, granted appellees' motion for a directed verdict.

Appellant argues that the trial court violated its order of April 27, 2004, order, which had imposed sanctions on Appellees for failure to respond to discovery. Specifically, appellant contends that "the trial court failed to follow its own order prohibiting Appellees from opposing claims in unanswered discovery requests.[17] In support of his position, appellant relies on the "law of the case" doctrine. This Court, however, rejected a similar argument in ***Gateway Towers Condominium Association v. Krohn,*** 845 A.2d 855 (Pa. Super. 2004):

> The doctrine of law of the case provides that if an appellate court has considered and decided a question on appeal, neither that court nor any trial court may revisit that question during another phase of the same case. ***See PPG Indus., Inc. v. Commonwealth Bd. of Fin.,*** 567 Pa. 580, 790 A.2d 261 267 n. 11 (2001); ***Peden v. Gambone Bros. Dev. Corp.,*** 798

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[17] ***Id*** at 24.

> A.2d 305, 310 (Pa. Cmwlth. 2002). "The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case." ***Peden,*** 798 A.2d at 310. Significantly, however, the doctrine applies only to the actions of an *appellate court,* ***see Tarantino v. Kutztown Univ.,*** 654 A.2d 115, 117 (Pa. Cmwlth. 1995), and cannot be applied to prevent a trial judge from reconsidering his or her prior ruling, ***see Farber v. Engle,*** 106 Pa. Cmmw. 173, 525 A.2d 864, 866 (Pa. Cmwlth. 1987). Although the related "coordinate jurisdiction" rule may prevent one trial judge from revising the rulings of another trial judge on the same question, that rule applies only where a second judge purports to review the order of a different judge. ***See Leoni v. Whitpain Twp.,*** 708 A.2d 999, 1001 (Pa. Cmwlth 1998). ***It does not prevent a judge from re-examining and correcting his or her own rulings. See id.***

Id. 845 A.2d at 861 (emphasis supplied). As the "law of the case" doctrine is not controlling, and appellant has not stated any other basis for this Court to conclude that the trial court erred, we find that this argument

presents no basis upon which to grant relief.

Having reviewed the contentions of appellant, and finding that they present no grounds upon which to overturn the decision of the trial judge, we affirm the judgment entered upon the directed verdict in favor of Appellee.

Judgment affirmed.

BOWES, J. FILES A CONCURRING AND DISSENTING MEMORANDUM.

Judgment Entered.

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Prothonotary

STEPHEN BARRETT, M.D.	:NO. 502 MAL 2007
Appellant	:
v.	:IN THE SUPERIOR COURT
TEDD KOREN and	:OF PENNSYLVANIA
KOREN PUBLICATIONS	:
INC.	:NO. 1035 EDA 2006
Appellees	:

Appeal from the Judgment entered April 7, 2006, in the Court of Common Pleas, Lehigh County, Civil No. 2002-C-1837

BEFORE: FORD ELLIOTT, P.J. BOWES, J., and McEWEN P.J.E.

MEMORANDUM: **FILED JUNE 11, 2007**

I concur with the majority's decision in this case with one exception. I believe Appellees' publication of the information that Appellant was "de-licensed" was capable of defamatory meaning. I further believe that it was published with actual malice once Appellees were informed that Appellant had not been de-licensed and yet failed to remove that assertion from their website or otherwise indicate on the website that it was incorrect. Hence, the question of whether Appellant was defamed with respect to the continued publication that he had been de-licensed should have been submitted to the jury.

Our Supreme Court delineated whether a publication can have defamatory meaning as follows:

> To determine whether a statement is capable of a defamatory meaning, we consider whether the statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." ***Birl v. Philadelphia Elec. Co.,*** 402 Pa. 297167 A.2d 472, 475 (1960) (quoting RESTATEMENT (FIRST) OF TORTS, §559 (1989). "Libel is the malicious publication of printed or written matter which tends to blacken a person's reputation and expose him to public hatred, contempt or ridicule." ***Schnabel v. Meredith,*** 378 Pa. 609, 107 A.2d 860, 862 (1954); ***see also Corabi v. Curtis Publishing Co.*** 441 Pa. 432, 273 A.2d 899, 904 (1971) (same). "The court must view the statements in context." ***Baker v. Lafayette College*** 516 Pa. 291, 532 A.2d 399, 402 (1987).
>
> Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. Thus, we must consider the full context of the article to determine the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the

average persons among whom it is intended to circulate.

Thomas Merton, 442 A.2d at 216. "It is not enough that the victim of the statements be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." ***Scott-Taylor, Inc. v. Stokes,*** 425 Pa. 426, 229 A.2d 733, 734 (1967)

Tucker v. Philadelphia Daily News, 577 Pa. 598, 615, 848 A.2d 113, 124 (2004).

In the present case, the entire article about Appellant was derogatory. It referred to him as a quack pot, and indicated that he was the defendant in a potentially meritorious multi-million lawsuit and was "now in trouble". While the first assertion was an opinion and the latter was true when published, even though the lawsuit was subsequently withdrawn, the article continued by stating that Appellant was de-licensed. Viewed contextually in this critical article, "de-licensed" unequivocally conveyed that Appellant's license to practice medicine had been revoked by the pertinent medical authority. This statement was false since Appellant had voluntarily let his license lapse, which, as Ted Koren admitted at his deposition, is not being "de-licensed." That term devalued Appellant's professional status, diminished his community

standing, and would discourage association with him by people in the field; it was defamatory. ***Id.*** (newspaper article was defamatory because it incorrectly implied that community activists were overly interested in money and sex, which would lessen their reputation in the community and likelihood that members of community would want to associate with them); ***MacElree v. Philadelphia Newspapers, Inc.*** 544 Pa. 117, 674 A.2d 1050, 1054 (1996) (publication that implied plaintiff in defamation suit was abusing his elected office and was racist was defamatory because it accused plaintiff of professional misconduct).

Furthermore, Appellees were informed that Appellant had not been delicensed but then failed to remove this information from their website or otherwise indicate therein that the information was incorrect. In my view, the continued appearance of the information on the website was not the equivalent of failing to print a retraction. A newspaper is printed once and then archived. On the other hand, when information is placed on a website and not removed, it remains readily available and reviewed, and hence, continues to be

published. By retaining that information on their website without indicating that the fact was incorrect, Appellees published the information with actual knowledge that it was false. The internet can be a dangerous tool, and when someone is informed that information detrimental to a person's professional standing is factually wrong, the person who chooses to maintain that information on their website should not be permitted to do so with impunity. When this comment is viewed in a light most favorable to Appellant as we must, I find that a jury could reasonably have concluded that the defendant was liable. Hence, in my view, this defamation action should not have been removed from consideration by the jury. I therefore respectfully dissent.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA - CIVIL DIVISION

STEPHEN BARRETT M.D.:	
Plaintiff	**:CIVIL ACTION**
vs.	**:NO. 12002-C -1837**
TEDD KOREN D.C. and	**:**
KOREN PUBLICATIONS	**:**
INC. Defendants	**:**

NOTICE OF FILING JUDGMENT

NOTICE is hereby given that a Final Judgment in the above captioned matter has been entered on April 7, 2006.

A copy of all documents filed with the Clerk of Court in support of the within judgment are enclosed.

Andrea E. Naugle, Clerk of Court

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA - CIVIL DIVISION

STEPHEN BARRETT M.D.:	
Plaintiff	**:CIVIL ACTION**
vs.	**:NO. 12002-C -1837**
TEDD KOREN D.C. and	**:**
KOREN PUBLICATIONS	**:**
INC. Defendants	**:**

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(a) STATEMENT

AND NOW, this 16th day of May, 2006, the undersigned enters the following statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(a):

A. **INTRODUCTION**

On October 13, 2005, at the close of the evidence in a jury trial and upon consideration of the Defendants' Motion For Directed Verdict, this Court entered an Order, for the reasons set forth on the record, granting said motion. At the same time, upon consideration of the Plaintiff's Motion For Directed

Verdict, this Court entered an Order for the reasons set forth on the record, denying said motion. The Plaintiff immediately made an oral motion for reconsideration which this Court denied on October 13, 2005.

On October 21, 2005, the Plaintiff filed a motion for post-trial relief. After delays due to transcription of the record, a continuance request by the Defendant due to vacation and two (2) requests by the Plaintiff for extension of time to file a brief in support of his motion for post-trial relief, argument was ultimately held on March 29, 2006. By Order dated march 31, 2006, this court denied the Plaintiff's post-trial motions. On April 7, 2006, the Plaintiff filed a Praecipe For Judgment for entry of judgment in favor of the defendants and against the Plaintiff in zero amount. On April 12, 2006, the Plaintiff filed an appeal from the

judgment entered in this matter on April 7, 2006 with the Superior Court of Pennsylvania at Docket number 1035 EDA 2006. On April 18, 2006, this Court entered an Order directing the Plaintiff to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.C.P. 1925(b). On April 26, 2006, the Plaintiff filed a "Statement Of Issues". Each of these issues will now be addressed individually.

B. **DISCUSSION OF THE PLAINTIFF'S STATEMENT OF ISSUES.**

1. **Whether or not the Trial Court erred as a matter of law in directing a verdict for Defendants against the Plaintiff?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005, pages 8 to 25.

2. **Whether or not the evidence viewed most favorably to the Plaintiff that: 1) the communication was defamatory; 2) the defendants published the communication; 3) the communication applied to Plaintiff; 4) the**

communication injured the Plaintiff; 5) Defendants published the communication with actual malice; and 6) the actual malice was established because, after notice of the falsity of the Internet communication, the Defendants continually posted it on the web site?

The Court fully addressed this issue on the record as reflected I the Notes of Testimony of October 13, 2005, pages 8 to 25.

3.. **Whether or not the Trial Court erred by dissecting the multiple defamatory words, instead of construing the communication as a whole as required by Rutt v. Bethlehem's Globe Publishing Company 335 Pa. Sup. 163,484 A.2d 72 (1984)?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005, pages 8 to 19 (in particular pages 15 to 19).

the Plaintiff asserts that all of the alleged defamatory statements, "quack pt", "de-licensed", "racketeering suit for a million dollars" and "in trouble"

must be read together, based on the holding in Rutt v. Bethlehem's Globe Publishing Company 335 Pa. Super. 163, 484 A.2d 72 (1984). However, Rutt states that alleged defamatory words in an article must be read in the context of that article.

In Rutt, the challenged article was an extended obituary of the appellant's son, who died as a result of a self-inflicted gunshot wound and the language at issue was "[c]ity police said [the victim] apparently shot himself to death with a rifle belonging to his father at the home of [friends], a couple of days after the victim's father asked him to leave his home..." The Rutt Court decided that for the purposes of determining whether the newspaper article was defamatory, the article must be construed as a whole, and each word

must be read in the context of the other words.

The context in which each statement was made was considered by the Court in its analysis of whether any of these statements were capable of defamatory meaning. Unlike the situation in Rutt, where the Court decided that the above quoted language, when read in the context of the entire article, was defamatory because it gave the article in inference that the victim shot himself because of his father, the statements at issue in the instant case do not depend on each other for their individual meanings and inferences. The Plaintiff offers no authority for the argument that all of the alleged defamatory statements must be read together. These were separate statements, each appearing in separate articles and therefore having their own context. Only "racketeering suit for a million

dollars" and "in trouble" were used in the same article and relate to each other, namely, the "in trouble" statement appears to relate back to the "racketeering suit for a million dollars statement and appears to be saying that Barrett is in trouble because he was sued in a racketeering suit for a million dollars. The Court considered this context when it made its ruling.

Even when read together, the statements at issue in this case are incapable of a defamatory meaning. Nothing about the statements changes when they are read together versus being read separately. Whether read separately or together, the statements "quackpot", "delicensed" and racketeering suit for a million dollars" and "in trouble" are incapable of defamatory meaning for the reasons stated on the record as cited above.

4. **Whether or not the evidence viewed most favorably to the Plaintiff established that Defendants knew that the defamatory statements were false, or with reckless disregard of their truth or falsity, particularly where the Defendant, Koren was a licensed health care practitioner, and he was using a made-up word--delicensed--to describe Dr. Barrett?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

5. **Whether or not the testimony of defendant, Dr. Koren, that he had "ill will" towards the Plaintiff plus keeping the defamatory information on the web-site is evidence of "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

6. **Whether or not the defense by a licensed health care professional that he was using a made-up perjorative word about the Plaintiff-delicensed- merely because someone else used it eliminates "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

6. **Whether or not the fact that Plaintiff's counsel received an admission from Defendant that his communication was false-knew about the lawsuit 14 months before it happened-is evidence of actual malice? [Plaintiff's "Statement Of Issues" contains two different issues identified as number 6)**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

7. **Whether or not the Court erred as a matter of law in not allowing the unanswered "third request for admissions" into evidence which facts clearly established "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 33 to 37.

The Court did not allow the Plaintiff's Third Request For Admissions into evidence because the Court granted the Defendants' objections to said admissions as they were conclusions of law, and therefore they were not the proper subject of

admissions.

The Court found that use of the word "evidence" in the Plaintiff's Third Request For Admissions was improper, as it required the Defendants to make a legal determination of what is evidence; a decision which must be made by a judge. The Court found that the Plaintiff should have used language such as "facts, documents, records and those such things".

As to the issue of the timeliness of the Defendants' objections, the Court found that while the objections were not made within thirty (30) days, if the requests are improper and if they are not provided for under the Rules and the caselaw, then they are not really requests for admissions in the first place. Therefore, the procedural rules guiding admissions are

inapplicable and the Court could, and in fact was required to, address the defendants' objections when they were voiced at trial.

8. **Whether or not the Trial Court eviscerated its own order of April 27, 2004 ordering that "...Defendants are prohibited from opposing the claim of Plaintiff at trial..." by allowing the Defendants to defend, despite not providing timely discovery responses?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 10, 2005, pages 50 to 68.

The Court's decision to allow the Defendants to present a defense at trial is moot. The Court did not base its decision to grant the Defendants' Motion for Directed Verdict on the defense presented. The Court based its decision on the fact that the alleged defamatory statements were incapable of a defamatory meaning and that, therefore, the Plaintiff was unable to

present a prima facie case of defamation. Therefore, the evidence and testimony presented by the Defendants had no bearing on the Court's decision to grant the Motion For Directed Verdict, and this issue is moot.

Even if the issue were not moot, it is the Court's strong position that it did, in fact, interpret and enforce its own April 27, 2004 Order properly. Relevant portions of the Order state that "the matters regarding which the questions were asked shall be taken to be established for the purposes of the action in accordance with the claims of the Plaintiff..." and that the "Defendants are prohibited from opposing the claims of Plaintiff at trial and from introducing in evidence designated documents, things or testimony." The Court did not intend this Order to preclude the Defendant

from opposing any claims by the Plaintiff, but only those directly related to the unanswered discovery requests propounded on the Defendants by the Plaintiff. When reading the above language as a whole, it is the Court's position that the Order reflects that intention. Therefore, the Court did, in fact, properly interpret and enforce its own Order.

The Plaintiff raised this issue in his Motion For Post-Trial Relief, which motion the Court denied. In that motion, the Plaintiff made four arguments based on his interpretation of the April 27, 2004 Order: (1) that the Plaintiff was entitled--at a minimum--to a binding instruction at the close of the case, as requested by the Plaintiff, that the Defendants could not oppose the status of the Plaintiff's testimony concerning

Plaintiff's claim that the California racketeering lawsuit was groundless; (2) that by failing to enforce its own Order, the Plaintiff was denied the opportunity to present his case before the jury; (3) that if the trial court enforced the Order, the trial court would have permitted the Plaintiff to read into evidence the Plaintiff's Request For Admission No. 3; and (4) that if the trial court enforced the Order, the Defendant's Motion For Directed Verdict would have been properly denied. The Court will address each of these arguments.

Even if argument (1) were true, that the Plaintiff was entitled to a binding instruction at the close of the case regarding the Plaintiff's license and the racketeering lawsuit, it would be harmless error. Such a binding instruction to the jury regarding the Plaintiff's

testimony about his license and as to the Plaintiff's claim that the California racketeering lawsuit was groundless would not necessarily have been enough for a jury to conclude that the defendants were liable for defamation.

In the Plaintiff's second argument that, were the Court to enforce the Order as the Plaintiff interpreted it, rather than as the Court intended and applied it, the Plaintiff would have had the opportunity to present his case to the jury. The Plaintiff did, in fact, present his case to the jury. After that opportunity, the Court granted the Directed Verdict.

The Plaintiff's third argument that, "if the trial court enforced the Order, the trial court would have permitted the Plaintiff to read into evidence the Plaintiff's Request For Admission No. 3" is misplaced

entirely. The Court reiterates that it did enforce its Order, just not as the Plaintiff would have preferred it to be enforced. The Court's decision to preclude the Plaintiff from reading the Plaintiff's Request For Admission No. 3 into evidence was not based in any way on its Order. It was based on the fact that the Court granted the Defendants' objections to the admissions because they improperly asked for legal conclusions.

The Plaintiff's fourth and final argument that if the Court had enforced the Order, the Motion For Directed Verdict would have been denied, is erroneous as well. Admittedly, if the Court had enforced the Order as the Plaintiff is interpreting it, that the Defendants could not oppose any or the Plaintiff's claims and that the Plaintiff's Request For Admissions No. 3 should have

been read into evidence, then the Plaintiff might be right. However, the Court did enforce its Order, in the context of how it was written and as the Court intended it to be enforced. The Order did not preclude the Defendants from opposing every claim of the Plaintiff, but only those specifically addressed by the Plaintiff in his discovery requests and left unanswered by the Defendants. Regarding the Plaintiff's Request For Admission No. 3, the Court precluded the admissions from being read into evidence because the admissions improperly asked for legal conclusions and therefore they were not admissions by definition.

BY THE COURT:

J. Brian Johnson, J.

FILED
APR 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1233

IN THE

Supreme Court of the United States

STEPHEN BARRETT, M.D.,

Petitioner,

v.

TEDD KOREN, D.C. and
KOREN PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Petitioner's failure to prove the defamatory character of the communications in question precludes jurisdiction for an examination of whether actual malice can be inferred from Respondent's failure to print a retraction?

(2) Whether the trial court erred in determining that Petitioner, a public figure plaintiff, failed to prove by clear and convincing evidence that Respondents published the alleged defamatory statements with actual malice?

RULE 29.6 STATEMENT

Respondents, Tedd Koren, D.C. and Koren Publications, Inc., have no parent corporations, and no publicly held company owns 10% or more of the stock of either of the Respondents.

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STATEMENT

The underlying action from which the instant Petition for a Writ of Certiorari is filed is a defamation action arising out of alleged injuries sustained by Petitioner Stephen Barrett, M.D., (hereinafter referred to as Petitioner) as a result of alleged statements made by one of the Respondents, Koren Publications. In his Complaint, Petitioner alleged that in August, 2001, Respondents intentionally, knowingly and falsely published communications which were defamatory and clearly and explicitly referred to Petitioner. Petitioner's claims of defamation focused on three alleged statements contained in an article circulated among various internet web sites. The first alleged defamatory statement that Petitioner asserts was made by Respondents was use of the term "de-licensed" physician when describing Petitioner. The second alleged defamatory statement was that Petitioner was "in trouble" in connection with a lawsuit that had been filed against him by a third party. The third and final alleged defamatory statement was the reference to Petitioner as a "quack-pot".

Both prior to and at the time of trial, Petitioner stipulated that he was a public figure. Respondents have strenuously denied the allegations contained in the Complaint, including that they published material that was defamatory to Petitioner and did so in an intentional, knowing, deliberate, reckless, willful, wanton, egregious or outrageous manner.

On October 13, 2005, at the close of evidence presented by Petitioner in a jury trial, Respondents

presented a Motion for Nonsuit, which was granted by the trial judge, the Honorable Brian Johnson. At the same time that the Motion for Nonsuit was granted, Judge Johnson denied Petitioner's Motion for Directed Verdict whereupon Petitioner made an oral motion for reconsideration, which Judge Johnson also denied.

On October 21, 2005, Petitioner filed a Motion for Post Trial Relief, and argument was held on March 29, 2006. By Order of Court dated March 31, 2006, the trial court denied Petitioner's Post Trial Motion. A Praecipe for Entry of Judgment in favor of Defendants (Respondents) and against Plaintiff (Petitioner) in the amount of zero dollars was entered by Respondent on April 7, 2006, and on April 12, 2006, Petitioner filed an appeal from judgment in this matter to the Superior Court of Pennsylvania, Docket Number 1035 EDA 2006.

On June 11, 2008, in its Memorandum, the Superior Court affirmed the Order entered by Judge Johnson. The Superior Court determined that the trial court's grant of a non-suit was proper because the evidence, even when viewed in a light most favorable to Petitioner, failed to establish the elements of defamation, including that the alleged defamatory statements were made with actual malice.

On January 2, 2008, the Supreme Court of Pennsylvania, Middle District, denied Petitioner's Petition for Allowance of Appeal.

DISCUSSION

I. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S JURISPRUDENCE

A. Pennsylvania Courts applied established law to both federal and state questions when resolving the issue of whether the statements themselves were capable of defamatory meaning.

The Court, not the jury, must first make the determination of whether a statement is capable of a defamatory meaning. *Kernick v. Dardanell Press*, 428 Pa. 288, 294 (1967). If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial. *Thomas Merton Center v. Rockwell Int. Corp.*, 497 Pa. 460 (1981); *see also Kernick v. Dardanell Press*, 428 Pa. 288, *supra.* ("It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. **If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury.** (Emphasis added.) (*Quoting Sarkees v. Warner-West Corp.*, 349 Pa. 365 (1944).

Petitioner has the burden of proving the defamatory character of the communications. 42 Pa. C.S. § 8343(a); *see also Tucker v. Phila. Daily News*, 577 Pa. 598, 614 (2001).

The Pennsylvania Superior Court's holding that the term "de-licensed" was not actionable, even when viewed in the context of other alleged defamatory statements, was consistent with its own precedent and well established standards set by this Court.

Petitioner alleged that Respondents defamed him by stating in a website publication that Petitioner was a "de-licensed" physician. However, the term "de-licensed" can be interpreted in many ways. Some Courts refer to the term de-licensed as a voluntary action to have one's license inactivated. *Internationally Hott II v. City of Elizabeth*, 1997 U.S. Dist. LEXIS 22869 (D.N.J., 1997) and *Ackley v. Wyeth Laboratories, Inc.*, 919 F.2d 397 (6th Cir. 1990). Other courts have referred to the term as one of temporary suspension. *ANA Small Business Investments, Inc. v. Small Business Administration*, 391 F.2d 739 (9th Cir. 1968). The use of the term in these cases is in accord with the action the Petitioner took in voluntarily suspending his license. Therefore, reasonable people can certainly conclude that the Petitioner was in fact de-licensed and Petitioner was correct in saying that he was de-licensed. Furthermore, as the court concluded in *Bogash v. Elkins*, 405 Pa. 437, 176 A2d 677 (Pa. 1962), statements which represent differences of opinion or are annoying or embarrassing are not, without more, libelous.

The Superior Court properly determined that

> even accepting Appellant's position that Appellee understood the word 'de-licensed' to mean an involuntary loss of license, the trial court properly determined that 'de-licensed',

> which the parties stipulated is a made up word, was adopted by Appellant from the website of another author, that he had his own understanding of the word, and that he had no reason to believe this information was false.

Barrett v. Koren, (Pa. Super. 1035 E.D.A. 2006 at pp. 9-10.) This sound reasoning is neither controverted by another intermediate appellate court opinion, or the United States Supreme Court on the same legal question. This issue, as determined by the Superior Court, is not one of first impression or of substantial public importance as to require resolution, and therefore, the Petition for Writ of Certiorari should be denied.

B. Pennsylvania Courts applied established law to both federal and state questions when resolving the issue of whether the Petitioner established clear and convincing evidence of actual malice.

Petitioner relies upon Judge Bowes concurring and dissenting opinion, appended to the Pennsylvania Superior Court's Opinion, that distinguishes information placed on a website from information placed in a newspaper, when coming to the conclusion that Respondents' failure to retract the term "de-licensed" could have allowed a jury to infer and conclude that Respondents acted with actual malice. The majority opinion of the Superior Court, in its Memorandum, properly applied the analysis and reasoning of seminal cases on this very issue and came to the appropriate

conclusion that actual malice could not be inferred from Respondents' failure to retract the term "de-licensed" from its internet publication.

Here, Petitioner concedes he is a public figure. Petitioner has often referred to himself as a public figure and various courts have treated him as such. Barrett has assumed the role as a consumer advocate in regard to various issues in the medical field. (R.87a) He maintains various web sites from which he expounds his so called knowledge. These sites have thousands of hits a year. (R.88a)

"Public figures" are allowed recovery for defamation of character only upon proof of "actual malice" because they usually enjoy such easy access to the media that they readily have the opportunity to defend themselves to public scrutiny and to the consequent increased risk of being subjected to defamation. *Curly v. Lisman*, 19 Pa. D&C 3d 520, 524 (1981).

"Actual malice" is a fault standard, predicated on the need to protect the public discourse under the First Amendment form the chill that might be fostered by less vigilant limitations on defamation brought by public figures. *Id.*; *see also Weaver v. Lancaster Newspaper, Inc.*, 875 A.2d 1093 (Pa. Super. 2005); *see also Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d 890, 904 (Pa. Super. 1995). Furthermore, "actual malice" must be proven applying a **subjective standard**, not an objective standard "by evidence that **the defendant *in fact* entertained serious doubts as to the truth of his publication.**" *Lewis v. Phila. Newspapers, Inc.*, (Pa. Super. 2003), 833 A.2d 185, 192 (2003), *supra* (*Curran v. Phila. Newspapers, Inc.*, 546 A.2d 639, 376 Pa. Super. 508 (1988).

While actual malice may be shown by circumstantial evidence of events surrounding the publication of the offending statement, the circumstantial evidence must tend to establish fabrication, or at least that the publisher had "obvious reasons to doubt the veracity of the informant or the veracity of the reports." *Sprague v. Walter*, 656 A.2d 890,904 (Pa. Super 1995) (citing *Herbert v. Lando*, 441 U.S. 153, 156-157 (99 S. Ct. 1635, 60 L. Ed. 2d 115) (1979)). "Although lack of truthfulness in a statement is a prerequisite to liability [in a libel action], mere falsity, is generally not sufficient to establish actual malice." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1091 (3d Cir. 1985). Similarly, evidence of ill will or a defendant's desire to harm the Plaintiff's reputation, without more, does not establish actual malice. *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d, *supra; see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-667 (105 L. Ed. 2d 562, 109 S. Ct. 2678) (1989) ("[T]he actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term . . . [Paras.] the phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will.")

It is respectfully submitted that Judge Bowes' Concurring and Dissenting Opinion, which distinguishes the internet from a print newspaper when analyzing whether the failure to retract a defamatory statement may be adequate evidence of actual malice, is a distinction without a difference. The standards for determining whether the failure to retract an alleged defamatory statement is adequate evidence of actual malice for constitutional purposes should not be treated differently, depending upon whether the statement is contained in print or on the internet.

The Pennsylvania Superior Court, in its Memorandum, properly applied the analysis and holding in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1984), that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitutional purposes. The Superior Court went on to examine the rationale used by the trial court judge, Judge Johnson, in determining this issue:

> [W]hen you talk about what he [Respondent] believed, just because Dr. Barrett asked for the retraction, that didn't necessarily mean that Dr. Koren agreed with him.
>
> And again, we go back to the measure that it is not what a reasonable person would do, it is what Koren actually believed and he still believed those things were true.

(N.T., October 13, 2005, pp. 23-24). Certainly, the request from Petitioner to retract the alleged defamatory statement was nothing more than Petitioner's opinion that he was not "de-licensed". No more proof or evidence, other than Petitioner's request, was offered that would have given Respondent reason to entertain serious doubts about the truth of the statement. The Pennsylvania Trial Court and later the Pennsylvania Superior Court properly determined that such evidence was not "clear and convincing", the necessary finding to establish actual malice on the part of Respondent. Its holding on this issue is consistent with other Appellate decisions, and the opinions of the United States Supreme Court.

II. REVIEW IS ALSO NOT MERITED ON ANY OTHER BASIS

Petitioner offers no reason for this Court to accept review other than a supposed incompatibility of *New York Times v. Sullivan*, a pre-internet case, with the present set of facts in the case *sub judice*. Petitioner does not assert that the decision below conflicts with any decision by a United States Court of Appeals or the highest court of another state. Petitioner does not claim that the Pennsylvania Courts have misunderstood the actual malice standard recognized by this Court, nor does he indicate why it is an important question of federal law that has not been, but should be, settled by this Court. This Court may not have jurisdiction to review the question presented; however, to the extent that jurisdiction exists, there are no compelling reasons to exercise it.[1]

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1. Denial of the Petition for Writ of Certiorari would be consistent with this Court's decision in *Tucker v. Philadelphia Daily News*, 172 S. Ct. 154 (October 2, 2006).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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